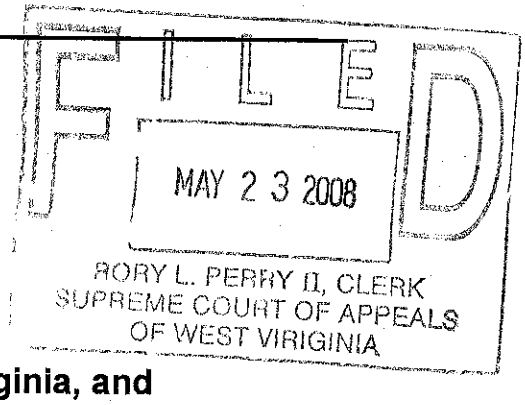
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33810



TERESA ESTEP,

Plaintiff and Appellee,

v.

FORD MOTOR COMPANY,
a corporation doing business in West Virginia, and

MIKE FERRELL FORD LINCOLN-MERCURY, INC.
a West Virginia Corporation,

Defendants and Appellants

On Appeal from the Circuit Court of McDowell County
Civil Action No. 02-C-228-M

BRIEF OF APPELLANTS FORD MOTOR COMPANY and MIKE FERRELL FORD LINCOLN-MERCURY, INC.

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THE KIND OF PROCEEDING AND NATURE OF THE RULINGS IN THE LOWER TRIBUNAL

This appeal arises out of a product liability, vehicular crashworthiness case tried in McDowell County in November, 2006. Appellee Teresa Estep (plaintiff below) claimed that her 1999 Ford Ranger was defective because its occupant-restraint system was not designed to protect her adequately in a crash. Plaintiff obtained a verdict on that claim against appellants Ford Motor Company and Mike Ferrell Ford Lincoln-Mercury, Inc. (collectively, "Ford") (defendants below). The trial court entered judgment on that verdict in favor of Teresa Estep in the amount of $993,157.50.[1] Ford then filed *Defendants' Motion for Judgment as a Matter of Law or in the Alternative a New Trial.* On March 14, 2007, the trial court entered an Order denying that post-trial motion, from which Order appellants take this appeal.

Appellants seek a reversal of the judgment entered against them, a reversal of the trial court's denial of judgment in their favor as a matter of law or, in the alternative, a reversal of the trial court's denial of their motion for new trial. This appeal puts most directly at issue four specific erroneous rulings by the trial court.

First, the trial court ruled that West Virginia's mandatory seatbelt law, W. Va. Code § 17C-15-49, precluded Ford from introducing any evidence whatsoever about seatbelts, regardless of the purpose for which that evidence would be used. Ford sought to introduce evidence about the seatbelt assembly with which this vehicle was equipped to show that the vehicle was designed to provide effective occupant-restraint crash protection and was not defective. This evidence included the admissions of

[1] The case was filed and prosecuted in the names of both Teresa Estep and Terry Estep, her former husband. The jury found in favor of Teresa Estep, but awarded no recovery to Terry Estep. Throughout this Brief, the term "plaintiff" is meant to refer only to Teresa Estep.

plaintiff's own expert that the seatbelt assembly, had it been used, would have prevented Ms. Estep's injury. The trial court refused to allow any such evidence.

Second, the trial court permitted plaintiff to base her claim on an improper standard for determining a product defect under West Virginia law. The standard that plaintiff's expert was permitted to use imposed absolute liability on the manufacturer based merely on two facts: (1) the air bag did not deploy in this accident, and (2) the plaintiff was injured in this accident. Plaintiff presented no evidence, through this expert or otherwise, to apply the standard required by the law of West Virginia for determining whether a product design is defective: what the reasonably prudent manufacturer would do in regard to the safety of the product, in light of the relevant state of the art.

Third, the trial court permitted the plaintiff's experts to present testimony describing the sequence of events by which, in their opinions, the plaintiff sustained her injuries in this accident. Yet these opinions were based upon a core factual assumption that was conclusively proven false. Each of these experts expressly based their opinion on the assumption that the steering wheel in this vehicle was bent in the crash. The undisputed evidence showed that the steering wheel was not bent, but was in the same configuration after the accident as it was when designed and manufactured. The plaintiff did not even try to rebut that evidence. The opinions of these experts should therefore have been stricken once it was established that the factual assumption for those opinions was false.

Fourth, the trial court refused to instruct the jury that compliance with the Federal Motor Vehicle Safety Standards gives rise to a rebuttable presumption that the product is not defective.

STATEMENT OF FACTS[2]

I. The facts that were not disputed.

This accident occurred on October 5, 2000, as plaintiff Teresa Estep was driving a 1999 Ford Ranger pickup truck at 30-35 mph on Panther Road in McDowell County.[3] She was rounding a right-hand curve when her vehicle went off the pavement to the right.[4] Apparently over-correcting, she then re-entered the road, crossed both lanes of travel, and went off the road to the left.[5] From that point, the wooded hillside drops from the road to the Tug Fork River some 30 feet below.[6]

After leaving the elevation of the road, the Ranger traveled downward to strike a large maple tree in a nose-down position, with its rear higher than the front and elevated at an angle 40° above horizontal.[7] Hitting the tree first at that angle with its front end pointed down, the truck then hit the tree with its roof at an angle of 70 or 71 degrees.[8] It then spun 180° around the maple tree, continued downward, and came to rest about 20 feet below that tree, at the base of the hill, with its rear wheels in the river.[9] The vehicle's airbags did not deploy during the accident.[10]

The photograph on the next page, from the evidence at trial, shows what the parties agree is the damage to the vehicle caused by its collision with the maple tree.[11]

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[2] Citations to materials in the record on appeal are identified in this brief as "ROA p ___." Citations to matters contained in the seven volumes of the court reporter's record of proceedings at trial are identified as "Vol. ___, p ___." Exhibits admitted as evidence are identified by exhibit number as either "PX ___" or "DX ___."

[3] Vol 2, pp 91-92; Vol 3, pp 160-61; Vol 4, pp 242-43; Vol 5, pp 53-54.

[4] Vol 3, pp 161-63; Vol 5, pp 59-60.

[5] Vol 3, pp 161-63, 166, 173-74; Vol 5, pp 59-60

[6] Vol 3, pp 111-12; PX 7.

[7] Vol 3, pp 112, 178-81; Vol 5, pp 79, 84.

[8] Vol 3, pp 179,181; Vol 5, pp 78-79.

[9] Vol 2, pp 99, 104, 118-21; Vol 3, pp 108-16, 181; Vol 5, pp 53, 58-63; PX 7; DX 68.

[10] Vol 2, p 114.

[11] This photograph was admitted into evidence as DX 21.

Ms. Estep, who was not wearing her seatbelt, found herself in the passenger side of the cab after the accident.[12] She sustained a compression wedge fracture of the L2 vertebrae and an injured coccyx (tailbone).[13] She had bruising on some parts of her body (right side of upper right arm, backs of legs) but suffered no other broken bones and sustained no fracture, laceration, or bruising on her skull, and no injury of any kind to her face, chest, abdomen or the fronts of her thighs.[14]

II. The facts that were disputed.

The plaintiff's theory was that the wheels of the plaintiff's vehicle stayed on the ground after it left the road, that it drove into the maple tree while still on the ground, that its collision with that tree brought the vehicle virtually to a stop, and that it then spun around the tree and rolled gently backwards down the hill into the river.[15] Her experts opined that it was the collision with the tree that resulted Ms. Estep's injury.[16]

Building on the premise that the steering column in this vehicle was bent in the accident, the plaintiff's injury-causation expert theorized that, upon impact with the maple tree, Ms. Estep's buttocks had been thrown upward off the seat, her lower body had caught beneath the steering wheel, and the force of the impact had thereby "whipped" her upper body over the steering wheel with enough force to bend the steering column and to injure her back.[17] On the basis of that theoretical sequence, this witness concluded that the injury would have been prevented if the airbag had inflated.[18]

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[12] Vol 4, p 191.
[13] Vol 2, pp 153-54; Vol 4, 124, 146; Vol 6, pp 24.
[14] Vol 3, pp 51-57; Vol 4, pp 129, 177, 182, 189-95; Vol 6, pp 18-19, 21-24, 40-41, 86; DX 49 – DX 60.
[15] Vol 3, pp 105-18, 187-92.
[16] Vol 3, p 120; Vol 4, 125-30, 145-46, 152-53.
[17] Vol 3, pp 127-28; Vol 4, pp 125-30, 172-76, 202.
[18] Vol 4, pp 141, 152.

(Notably, this same expert testified at her deposition that Ms. Estep would not have sustained this injury if she had been wearing her seatbelt.[19] The plaintiff herself has so conceded.[20] The trial court, however, would not permit Ford to present any such evidence.[21])

The starting point on which the theory of this causation sequence was constructed, i.e. that the steering column in this vehicle was bent in the accident, rested on one thing only: Plaintiff's expert witness, Gary Derian, had measured the gap between the steering wheel cover and the steering column shroud on this vehicle and found that gap to be wider at the top than at the bottom.[22] *Assuming* that this gap had been the same all the way around the steering column before the accident, merely because "that would be the way [he] would design it," Derian concluded that the steering column was bent during the accident.[23] Neither he nor any of the plaintiff's other experts, however, compared that measurement to the design specifications, or to the steering column of an undamaged vehicle.

On the other hand, Ford's experts concluded that the Ranger left the ground as it went off the road, hit the maple tree six feet above the ground, and then, after spinning around that tree, fell the remaining 20 or so feet, scarring several more trees, to "slam down" on its wheels at the edge of the riverbank.[24] In the opinion of Ford's biomechanical expert, it was the vertical force of that final impact that caused the injury

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[19] Vol 5, pp 11-12.
[20] ROA p 70 ("It is also true that had Teresa been wearing her seat belt, the injury would have been avoided.")
[21] ROA pp 89-92.
[22] Vol 3, pp 189-92.
[23] Vol 3, pp 192, 195-96.
[24] Vol 5, pp 53-54, 95-97, 128-29, 134; DX 317; DX 329.

Ms. Estep's back.[25] Accordingly, inflation of the airbag would have done nothing to prevent that injury.[26] What is more, especially at the steeply-inclined angle at which her vehicle hit the maple tree, the longitudinal (front to back) force of that impact was not sufficient to have triggered the airbag in any event.[27]

Ford's experts also explained that the plaintiff's theory could not be reconciled with the physical evidence: (1) several trees had been either broken off or gouged well above the ground as the vehicle traveled from the road to the riverbank;[28] (2) the trees, roots, and other obstacles on the ground made it impossible for the vehicle to have simply rolled down the hill,[29] and (3) Ms. Estep did not have any of the injuries to the front of her body that would have resulted from having been "whipped" over the steering wheel as her witness theorized.[30]

Finally, Ford presented evidence, which stood without contradiction or rebuttal, that the steering column of this vehicle was *not* bent in the accident but was in precisely the same configuration after the accident as it was before. The gap that Derian had measured between the steering wheel cover and the steering column shroud *had always been* wider at the top than at the bottom; the steering column of this vehicle was designed to be that way.[31] Ford even presented the steering column from an undamaged vehicle to compare with this one to show that their gaps were identical.[32] The photograph on the next page shows this direct comparison.[33]

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[25] Vol 6, pp 70-71, 82.
[26] Vol 6, pp 62, 97.
[27] Vol 5, pp 54, 109-10, 134.
[28] Vol 5, pp 72-73, 90-91, 126; DX 313 – DX 316.
[29] Vol 5, pp 65, 129; DX 66; DX 308; DX 310 – DX 312.
[30] Vol 6, pp 18-24, 49, 59-60, 70, 86-87.
[31] Vol 6, pp 197-202.
[32] Vol 6, pp 199-200.
[33] This photograph was admitted into evidence as DX 379.

There was no effort whatsoever to challenge this evidence. The factual assumption that it conclusively refuted was the foundation for the testimony of the only expert witness whom the plaintiff offered to establish the cause of her injuries, as that witness herself candidly admitted.[34]

ASSIGNMENTS OF ERROR

I. **The trial court erred when it ignored the plain terms of West Virginia Code §17C-15-49 and prevented the jury from learning that the design of the Ranger included a seat belt that would have prevented plaintiff's injury had it been used, and that plaintiff had been warned to use it notwithstanding the existence of an airbag; the exclusion of this evidence denied Ford's right to due process.**

West Virginia Code § 17C-15-49 bars evidence of violation of the seat belt law only when that evidence is used to show the plaintiff was negligent or had failed to mitigate damages. It does not bar that evidence when it is used to show something else on a different issue.

In particular, for a product liability case such as this one – where the plaintiff claims the vehicle was not adequately designed to restrain its occupants in a crash – the statute does not preclude the use of that evidence to show the vehicle *was* designed to be reasonably safe in a crash when the challenged design is considered as a whole and *all* of its inherent safety features are taken into account. Nor does the statute preclude the use of that evidence to show the plaintiff's injury was not caused by any defect or deficiency in the design of the vehicle's occupant-restraint system.

In this case, evidence of the plaintiff's failure to wear an available seat belt was relevant both to show the reasonableness of the occupant-restraint design of this

[34] Vol 4, pp 169, 206.

vehicle and to refute the claim that the inadequacy of that design was the cause of the plaintiff's injuries. Because of this error, Ford is at the very least entitled to a new trial.

II. The trial court erred in denying Ford's motion for judgment as a matter of law, because the plaintiff did not show that the vehicle was "defective" under the standards established by West Virginia Law.

In West Virginia, the test for establishing strict product liability is whether the product is defective in the sense that it is not reasonably safe for its intended use. *See, Morningstar v. Black & Decker Manufacturing Company*, 162 W. Va. 857, 888, 253 S.E.2d 666, 683 (1979). This is determined by what a reasonably prudent manufacturer would have done at the time the product was made, considering the general state of the art, including design, labels and warnings, and economic costs. *Id.*

The opinion of the plaintiff's expert – which was based solely on the assertion that an airbag should always deploy when it would prevent injury and never deploy when it would not – did not address any of these factors and was insufficient as a matter of law to support a finding of design defect. The opinion should not have been admitted and will not support the verdict. Ford's motion for judgment as a matter of law should have been granted.

III. The trial court erred in allowing the plaintiff's experts to present opinion evidence based entirely upon speculation and conjecture about the crash sequence and the steering wheel deformation.

The testimony of plaintiff's accident reconstruction witness should have been stricken when it became clear he had no sensible basis for his conclusions, which he reached without actually examining the accident scene or taking any measurements there, and which disregarded undisputed physical evidence directly contradicting his belief that the vehicle could have rolled on its wheels down the embankment into the

river.

More importantly, this expert concluded that the plaintiff struck the steering wheel in this accident because he observed that the steering wheel was moved out of position. He admitted, however, that this was simply an assumption; he had no basis on which to say the steering wheel after the crash was not in the same position as it was when manufactured. When it was proved, without rebuttal or contradiction, that the steering wheel and steering column were both as originally designed, the court erred in allowing the jury to consider opinion testimony from this witness based on this demonstrably false factual assumption.

This error was compounded when the trial court then allowed another of the plaintiff's experts, testifying on injury biomechanics, to base her opinions as well on the false factual assumption that the steering wheel was deformed in the accident. Because respondent failed to carry the burden of proof on injury causation, the trial court erred when it denied Ford's motions for judgment as a matter of law.

IV. The trial court erred in failing to instruct the jury that compliance with Federal Motor Vehicle Safety Standards raises a rebuttable presumption that the product was safe.

The jury should have been instructed that compliance with Federal Motor Vehicle Safety Standards raises a presumption that the vehicle is not defective. Those standards are not a set of barely-adequate minimal requirements.

They are instead the result of a deliberate regulatory process by the United States Department of Transportation. This agency is charged with establishing those national standards to "meet the need for motor vehicle safety." 49 U.S.C. § 30111(a). By law, each safety standard so established must "protect[] against unreasonable risk of

death or injury." 49 U.S.C. § 30102(8). Although the jury was told it could "consider" compliance with the Federal Motor Vehicle Safety Standards, the instruction actually given allowed the jury to disregard the reasonableness of those standards. Thus, the trial court erred when it refused to instruct the jury that compliance with applicable Federal Motor Vehicle Safety Standards raises a rebuttable presumption that the product is safe. On the basis of this error, Ford should at least have a new trial.

ARGUMENT

I. The trial court was wrong to bar Ford from presenting evidence showing that this vehicle was well designed to restrain its occupants in a crash.

This is perhaps the central issue in this appeal: The trial court barred Ford from presenting evidence that would show the reasonableness of the design it adopted to protect the occupants of this vehicle by restraining them in a crash. The plaintiff's claim directly attacked the reasonableness of that very design. Yet Ford was prevented from defending it.

Ford was not allowed to explain how the various components of its occupant-restraint design for this vehicle were part of one system, designed and intended to work together as a coherent whole in the event of a crash. And it was barred from presenting any evidence whatsoever, of any kind, that might even hint at a central feature of that design – the seat belt – simply because the plaintiff refused to use it. What is more, Ford was not allowed to show the jury that the design of this vehicle would in fact protect an occupant in a crash just like this one – *if* the safety features Ford included in that design are used as intended.

In short, the plaintiff was not held to her burden of showing that the design of this vehicle's occupant-restraint system is not reasonable when taken as a whole – which, after all, is the way such a system should be considered – as a whole. Instead, the plaintiff was left free to focus her criticisms on just one lonely component of that total design, the airbag, torn from its context, isolated from all the other features of that design, and considered in a vacuum. She was thus allowed to keep the jury ignorant of the other components of the very occupant restraint system they were being asked to declare defective, and keep them blinkered from the other safety features in that system. This was particularly egregious given that the central repeating theme of her expert's criticism was that Ford's design left a "gap" in the protection it gave occupants in a crash:

> [T]he design of the system in this truck does not protect the occupants from pole crashes – or I should say there's a gap in the protection.[35]
> . . . .
>
> A . . . . [T]hey knew that there was a gap in the protection with the single point sensor in this Ranger.
>
> Q And they did nothing to Fix it?
>
> A They didn't. They accepted it.[36]
> . . . .
>
> Ford did the tests, and their tests show the gap in the protection that we talked about already.[37]
> . . . .
>
> I'm saying this single point sensor had a gap in the protection that Ford accepted.[38]

[35] Vol 3, p 140 at lines 1-3.
[36] Vol 3, p 148 at lines 18-21.
[37] Vol 3, p 214 at lines 7-8.
[38] Vol 3, p 230 at lines 11-12.

This was shamelessly misleading. There was no "gap" that Ford "accepted" in the occupant-restraint design of this vehicle. This alleged "gap" – a collision in which the front-to-rear impact forces are not powerful enough to trigger the airbag – is covered *by the seatbelt*. Yet Ford was utterly barred from telling the jury anything about that. What is more, the jury was invited to assume that the seatbelt was either entirely irrelevant or that it had failed in this accident – neither of which was true.

The sole basis for the plaintiff's objection to this evidence was her contention that West Virginia Code §17C-15-49 utterly barred all of it for any purpose whatsoever.[39]

The sole basis for the trial court's exclusion of this evidence was its adoption of this same sweeping interpretation of the statute.[40] This presents a question of law and is therefore reviewed *de novo*. *See State v. Saunders*, 219 W.Va. 570, 573, 638 S.E.2d 173, 176 (2006) ("Because this case involves an issue of statutory interpretation, our review is *de novo*."); *see also* Syl. Pt. 1, *Crystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 139, 459 S.E.2d 415, 416 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.").

The trial court's ruling cannot survive any such review. That ruling ignores the plain language of the statute it purports to apply, defies every relevant rule of statutory construction, produces absurd and unjust results the Legislature could not have intended, and is contrary to the instructive reasoning of a host of courts construing nearly identical statutes in many other states. It must be reversed.

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[39] ROA 70-76.
[40] ROA 89-92.

A. The plaintiff put directly at issue the reasonableness of Ford's design of the occupant-restraint system in this vehicle – precisely the subject on which Ford sought to present this evidence.

Neither the plaintiff nor any of her witnesses has suggested that the vehicle itself caused this accident. Instead, her case was based entirely on the contention that the vehicle's occupant-restraint system did not adequately protect her once the accident began. On that basis, she asserted a strict liability "crashworthiness" claim against Ford for its allegedly-defective design of the 1999 Ranger.[41]

In the seminal case adopting such a cause of action for West Virginia, this Court noted that "crashworthiness" can be defined as "the protection that a passenger motor vehicle affords its passengers against personal injury or death as a result of a motor vehicle accident." *Blankenship v. General Motors Corp.*, 185 W.Va. 350, 351 n.1, 406 S.E.2d 781, 782 n.1 (1991) (quoting 15 U.S.C. § 1901(14)). In this case, plaintiff's crashworthiness claim thus asserted that the 1999 Ranger was defective because the design of its occupant-restraint system allegedly failed to provide her with adequate "protection . . . against personal injury or death as a result of a motor vehicle accident."

A claim alleging that a product was defectively designed asks whether the manufacturer used reasonable care in that design:

> 'The question is: did the manufacturer use reasonable care in designing and manufacturing the product at the time it was marketed, not whether it could possibly have been made better or more safe, or later has been made better or more safe.'

Church v. Wesson, 182 W.Va. 37, 40, 385 S.E.2d 393, 396 (1989) (*quoting Chase v. General Motors Corp.*, 856 F.2d 17, 20 (4th Cir 1988). *See also Morningstar v. Black*

[41] ROA pp 1-16.

and Decker Manufacturing Co., 162 W.Va. 857, 888, 253 S.E.2d 666, 682-83 (1979) ("[T]he product is to be tested by what the reasonably prudent manufacturer would accomplish in regard to the safety of the product. . . .").

Plaintiff's claim thus put directly at issue whether Ford used "reasonable care" in designing the 1999 Ranger to restrain occupants of the vehicle and thereby protect them against personal injury or death in the event of a crash. Because the plaintiff herself chose to put the reasonableness of that design squarely at issue, it defies common sense – not to mention established legal principles and basic fairness – to prohibit the defendant from presenting evidence of all the safety features included in that very design. To determine whether Ford used reasonable care in designing this vehicle to be crashworthy, the jury had to be able to consider all of the occupant-restraint considerations that Ford incorporated into that design – including the seat belts. The jury also had to be able to consider evidence demonstrating the effectiveness of that design in accomplishing what it was intended to do in a crash – when its features are properly used as intended.

Not surprisingly, courts have consistently so held; a vehicle's crash-protection features must be considered *as a whole* in deciding whether its design is defective. The United States Fourth Circuit put it succinctly:

> In assessing crashworthiness, rather than focus on the allegedly defective part of the automobile, the jury must consider whether the vehicle was unreasonably dangerous *as a whole*.

Jimenez v. DaimlerChrysler Corp., 269 F.3d 439, 458 (4th Cir. 2001) (emphasis by the court). This reasoning is especially compelling here, in light of the incessant references by plaintiff's witness to an alleged "gap" that Ford purportedly "accepted" in the

occupant-restraint design of this vehicle.

There is more. This is not just a matter of legal principles and basic fairness. As a matter of science, the various design features incorporated into a vehicle to protect its occupants in a crash *should* be considered together. The interrelationship between airbag and seatbelt is just one small example. As it happens, the National Highway Traffic Safety Administration has examined this relationship and commented upon it in the Federal Register. *See* 44 U.S.C. § 1507 (directing courts to take judicial notice of the contents of the Federal Register).

An airbag can actually *add* to an occupant's injury, or even cause his death, if it deploys when the occupant is not in the right position. *See* 62 Fed Reg. 62406-07, 62409; 65 Fed. Reg. 30681, 30683. Under other circumstances, an airbag can save the occupant's life. *See* 62 Fed. Reg. 62409. Seatbelts, on the other hand, can do little to prevent certain injuries against which an airbag can be very effective. *See* 62 Fed. Reg. 62421, 63430. And, if the airbag is incorporated into the design with the seatbelt, it is possible to reduce the possibility of injuries that the seatbelt itself might cause. See 62 Fed. Reg. 62411.

The National Highway Traffic Safety Administration summarizes the point on its website:

> Air bags are designed to work with safety belts, not by themselves. Air bags, by themselves, have a fatality-reducing effectiveness of only 12 percent.[42]

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[42] Available at the following Internet address:
http://www.nhtsa.dot.gov/portal/site/nhtsa/template.MAXIMIZE/menuitem.58b39fa1d9e4e0bd304a4c4446108a0c/?javax.portlet.tpst=4427b997caacf504a8bdba101891ef9a_ws_MX&javax.portlet.prp_4427b997caacf504a8bdba101891ef9a_viewID=detail_view&itemID=1c259459dd6bff00VgnVCM1000002c567798RCRD&viewType=standard&detailViewURL=/portal/site/nhtsa/template.MAXIMIZE/menuitem.58b39fa1d9e4e0bd304a4c4446108a0c/!1429787843!-1425437716?javax.portlet.tpst=4427b997caacf504a8bdba101891ef9a_ws_MX

Simply put, as a matter of law, as a matter of fairness, and as a matter of engineering, the jury should have been allowed to learn about *all* of the occupant-restraint safety features that Ford incorporated into its design of this vehicle. Otherwise, they could hardly determine whether Ford "used reasonable care" in that design. There can be little doubt this evidence was, as the Seventh Circuit put it, "at least *relevant* to the manufacturer's effort to show that he used due care." *Barron v. Ford Motor Company of Canada Ltd.*, 965 F.2d 195, 200 (7th Cir.), *cert denied*, 506 U.S. 1001 (1992) (emphasis by the court).

As a result, that evidence should have been admitted unless there was some very good reason to exclude it. *See* W.V.R.E. Rule 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of West Virginia, by these rules, or by other rules adopted by the Supreme Court of Appeals.") There was no such reason.

B. Nothing in the plain language of the West Virginia statute bars evidence that the plaintiff was not wearing a seatbelt when that evidence is offered to show the reasonableness of the design of the vehicle's occupant-restraint system – especially when the plaintiff has put that system directly at issue.

The trial court's construction of this statute fails where it ought to begin, with the language of the statute. *See In re Greg H.*, 208 W.Va. 756, 760, 542 S.E.2d 919, 923 (2000) ("In interpreting a statute, the initial focus is, of course, upon the statutory language itself.") That language simply does not say what the plaintiff would like it to say and what the trial court took it to mean. It does not say that evidence of a plaintiff's nonuse of a seatbelt is inadmissible in all cases for any purpose. It certainly does not say that such evidence is inadmissible to show the reasonableness of the vehicle's

design to protect its occupants in a crash when the plaintiff has chosen to put the reasonableness of that very design directly at issue.

One will scour the words of this statute in vain looking for any such provision:

> A violation of this section is not admissible as evidence of negligence or contributory negligence or comparative negligence in any civil action or proceeding for damages, and shall not be admissible in mitigation of damages: Provided, That the court may, upon motion of the defendant, conduct an *in camera* hearing to determine whether an injured party's failure to wear a safety belt was a proximate cause of the injuries complained of. Upon such a finding by the court, the court may then, in a jury trial, by special interrogatory to the jury, determine (1) that the injured party failed to wear a safety belt and (2) that the failure to wear the safety belt constituted a failure to mitigate damages. The trier of fact may reduce the injured party's recovery for medical damages by an amount not to exceed five percent thereof. In the event the plaintiff stipulates to the reduction of five percent of medical damages, the court shall make the calculations and the issue of mitigation of damages for failure to wear a safety belt shall not be presented to the jury. In all cases, the actual computation of the dollar amount reduction shall be determined by the court.

W. Va. Code §17C-15-49 (d).

The most that the plain language of this statute can be taken to say is that a plaintiff's failure to wear a seatbelt cannot be used "as evidence of negligence or contributory negligence or comparative negligence . . . [or] in mitigation of damages." W. Va. Code §17C-15-49 (d).[43] Nothing in its plain language says that a plaintiff's failure to wear a seatbelt cannot be used as evidence of something *other than* negligence, contributory negligence, comparative negligence, or mitigation of damages.

[43] Actually, the precise wording of this statute excludes nothing more than evidence of "a violation of this section." W. Va. Code §17C-15-49(d). Carefully read, the wording therefore does not exclude evidence that the plaintiff was *not wearing* a seatbelt; it simply excludes evidence that the plaintiff *violated the statute* by not wearing a seatbelt. This point, while sound, is hardly essential to Ford's argument; the statute in no event excludes evidence of the plaintiff's non-use of a seatbelt when that evidence is offered as evidence on something *other than* the plaintiff's negligence or failure to mitigate damages.

This simple point should end the matter. It must be presumed the statute would actually say this evidence cannot be used for *any* purpose if that is what it meant. *See Subcarrier Communications, Inc. v. Nield*, 218 W.Va. 292, 299, 624 S.E.2d 729, 736 (2005) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.")(internal quotation marks and citations omitted); *State v. Boatright*, 184 W.Va. 27, 29, 399 S.E.2d 57, 59 (1990) ("One canon of statutory construction is to follow the statute's plain, unambiguous language.")

But that is not what it says. Ford made abundantly clear that it was not offering this evidence on any of the things for which the statute says the evidence is inadmissible.[44] Instead, Ford was offering the evidence to refute the plaintiff's claim that Ford did not use reasonable care in designing the 1999 Ranger to restrain occupants in a crash such as this. There is nothing in this statute that says this evidence cannot be used for that purpose.

C. The trial court's application of this statute to bar any evidence related to the seatbelt, regardless of the purpose for which that evidence was offered, defies established rules of statutory construction.

The trial court's sweeping application of this statute to exclude any mention whatsoever of the seatbelt in this vehicle, regardless of the purpose for which that evidence was offered, defies every relevant rule of statutory construction.

The most obvious starting point is the rule that courts must take statutes as they are written. They should neither add words that are not there nor ignore the words that are there:

> 'It is not for this Court arbitrarily to read into [a statute] that

[44] ROA pp 77-88; Vol 5, pp 8-15.

> which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.'

Phillips v. Larry's Drive-In Pharmacy, 220 W.Va. 484, 491, 647 S.E.2d 920, 927 (2007) (*quoting Banker v. Banker,* 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996)).

Here, the trial court did both. As explained above, this statute specifically lists the issues on which it prohibits evidence concerning the failure to use a seatbelt. That list does not include the issue on which Ford wanted to use this evidence. There is nothing in the words of this statute to prevent the evidence from being used for a purpose that is not included on the list it prohibits. The trial court's ruling added those words.

That ruling had the effect of making this statute a flat ban on any evidence whatever concerning the failure to use a seatbelt, regardless of the issue on which the evidence is presented or the purpose for which it is offered. Indeed, the ruling went even beyond that; Ford was not permitted even to mention the seatbelt in this vehicle, much less permitted to show the role that seatbelt played in the reasonableness of its design.[45] The trial court thus rendered superfluous the statute's itemized list of the specific, narrow purposes for which it says such evidence cannot be used.

This was improper. It must be presumed the Legislature included that itemized

[45] *See, e.g.* Vol 6, pp 7-11. The trial court's ruling at this point in the record illustrates the overbroad effect it gave to this statute in applying it to exclude any evidence of any kind that might even *hint* at a seatbelt. The trial court sustained plaintiff's objection to photographs that Ford's biomechanical expert intended to use to show that, under the plaintiff's theory of how she was injured, the plaintiff would have had to be positioned to hit her head on the roof or windshield when the vehicle hit the tree – which is when she claimed her spinal injury occurred. The photographs showed an exemplar vehicle, suspended in the air at the elevated angle at which the vehicle hit the tree, with a female of the plaintiff's size behind the wheel and the door of the vehicle removed so that her position could be seen. The trial court excluded these photographs because the female in the suspended vehicle was wearing a safety harness to prevent her from falling out the open door of the suspended vehicle.

list for a reason:

> It is a well known rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning.

Evans v. Evans, 219 W.Va. 736, 740, 639 S.E.2d 828, 832 (2006) (*quoting State ex rel. Johnson v. Robinson*, 162 W.Va. 579, 582, 251 S.E.2d 505, 508 (1979)). *See also Weston, Inc. v. Mineral County,* 291 W.Va. 564, 568, 638 S.E.2d 167, 171 (2006) ("It is presumed that each word in a statute has a definite meaning and purpose."); *State v. Saunders*, 219 W.Va. 570, 576, 638 S.E.2d 173, 179 (W.Va. 2006) ("We are required to operate under the presumption that the Legislature attaches specific meaning to every word and clause set forth in a statute.").

No part of a statute should be treated as meaningless. *See Savilla v. Speedway SuperAmerica*, LLC, 219 W.Va. 758, 764, 639 S.E.2d 850, 856 (2006). Yet the trial court's ruling had just that effect for this itemized list, since it applied the statute to bar any evidence related to the seatbelt regardless of the issue on which it was presented.

The trial court got it exactly backwards. Rather than render the list superfluous, the trial court should have seen the list as controlling. The fact that this statute bars the use of seatbelt evidence for issues that are included *on* the list means the Legislature did not intend the statute to bar use of that evidence for issues that were *left off* the list:

> In the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies. . . . . If the Legislature explicitly limits application of a doctrine or rule to one specific factual situation or omits to apply the doctrine to any other situation, courts should assume the omission was intentional; courts should infer the Legislature intended the limited rule would not apply to any other situation.

Phillips v. Larry's Drive-In Pharmacy, 220 W.Va. 484, 492, 647 S.E.2d 920, 928 (2007) (internal quotation marks and citations omitted).

This is an overwhelmingly well-established rule of statutory construction. *See, e.g.,* Syl. Pt.3, *Manchin v. Dunfee*, 174 W.Va. 532, 327 S.E.2d 710 (1984) ("In the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies."); *Savilla v. Speedway SuperAmerica, LLC,* 219 W.Va. 758, 762, 639 S.E.2d 850, 854 (2006) (the statute's "express mention of certain persons who have a cause of action . . . implies the exclusion of other persons who are not mentioned in the statute."); *Weston, Inc. v. Mineral County*, 219 W.Va. 564, 568, 638 S.E.2d 167, 171 (2006) ("the statute's express mention of counties that have not created planning commissions clearly implies the exclusion of counties that have created planning commissions.")

The trial court seems to have ignored this rule completely.

Finally, it is worth considering the plain sense of the matter. The trial court's interpretation of this statute to impose a sweeping and categorical ban on all evidence of the failure to wear a seatbelt – on any issue for any purpose – compels absurd and unjust results. Assume that this interpretation were correct. The plaintiff asserting a crashworthiness claim could, as the plaintiff did here, assert that the vehicle's occupant-restraint system was defectively designed, yet exclude any evidence that he was not using the principal feature of that design – the seat belt. If the evidentiary exclusion in this statute were indeed that broad, there would be no justifiable basis on which to avoid the same result in a case where the plaintiff asserted that the design of the *seatbelt itself* was defective. The defendant would *still* be barred from showing that the plaintiff

was not wearing it.

Such a result would be absurd, of course, but that is where this line of thought compels itself to go. For this reason alone, the statute cannot be construed in this way:

> It is a fundamental principle of law that wherever a statute is capable of two constructions, one of which would work manifest injustice, and the other would work no injustice, it is the duty of the court to adopt the latter, as it can scarcely be presumed that an injustice was in the legislative intent.

Dickey v. Smith, 42 W.Va. 805, 26 S.E. 373, 375 (1896) (internal quotation marks and citation omitted). *See also Richardson v. State Compensation Com'r*, 137 W.Va. 819, 824, 74 S.E.2d 258, 261 (1953) ("It is to be supposed that the legislature did not intend an absurd or unreasonable result.")

This Court has acknowledged its duty "to avoid whenever possible a construction of a statue that leads to absurd, inconsistent, unjust, or unreasonable results." *State ex rel Simpkins v. Harvey*, 172 W.Va. 312, 320, 305 S.E.2d 268, 277 (1983); *Meadows v. Lewis*, 172 W.Va. 457, 473, 307 S.E.2d 625, 641-42 (1983) (same). The trial court's ruling is just such a construction of this statute.

D. Virtually identical statutes in other states have been consistently held to allow seatbelt evidence when, as here, it is used to refute a plaintiff's claim that the vehicle was not designed to adequately protect occupants in a crash.

Nearly identical statutes in many other states have been consistently held to permit the use of seatbelt evidence in a crashworthiness case. In every one of those states, the statute would have barred the use of that evidence to show the plaintiff's comparative negligence or failure to mitigate damages. Yet in none of them was the statute held to prevent the use of that evidence on other relevant issues. Most notably, in every one of these cases, that evidence was held to be admissible when offered to

show that the challenged crash-protection design of the vehicle was reasonable when *all* of the safety features included in that design are taken into account.

The same reasoning that led to this conclusion for all of those other states should lead to the same conclusion here.

1. Illinois.

The statue in Illinois, similar to the statue here, provides that "failure to wear a seat safety belt . . . shall not be considered evidence of negligence, . . . and shall not diminish any recovery for damages." *DePaepe v. General Motors Corp.*, 33 F.3d 737, 745 (7th Cir. 1994) (*quoting* 625 ILCS 5/12-603.1(c)). Not only is the Illinois statute virtually identical to the one in West Virginia, but the plaintiff's claim in *DePaepe* was remarkably similar to the plaintiff's claim here.

That, too, was a crashworthiness case in which the plaintiff asserted that his spinal injury was caused by the vehicle's defectively-designed occupant-protection system. There, the plaintiff claimed that his injury occurred when he struck the sun visor and windshield header. 33 F.3d at 738-39. At trial, the defendant was allowed to present evidence concerning the vehicle's seatbelt system, which was of course part of the vehicle's occupant-protection system, in order to rebut the plaintiff's claim that the vehicle's design was not crashworthy.

On appeal, the plaintiff complained that the Illinois statute prevented the defendant from presenting that evidence. The Seventh Circuit flatly rejected that argument. The statute did prevent the defendant from using seatbelt evidence to show that the plaintiff was negligent, or to reduce his damage recovery; but it did not prevent the defendant from using that evidence to rebut the plaintiff's claim that the vehicle's

design was not crashworthy:

> GM's purpose here was not to show that [the plaintiff] had himself been negligent in the hopes of diminishing his recovery in some way. Instead, GM wished to show that its design of the sun visor/header was not unreasonably dangerous because the vehicle also was equipped with a functional restraint system that would prevent an occupant from striking those components in an accident.

33 F.3d at 745-46. The statute simply did not bar the evidence when it was offered on that issue:

> Like North Carolina's rule, the Illinois seat belt statue is directed to the contention that a plaintiff was himself negligent in failing to utilize the vehicle's restraint system. . . . It was therefore not intended to preclude evidence that a vehicle was equipped with a functional restraint system for the purpose of showing that the overall design of the vehicle was reasonably crashworthy.

33 F.3d at 746.

Of course, precisely the same is true here. In this case, Ms. Estep claims that she struck the steering wheel/steering column, thereby causing her back to flex in a way that injured her spine. Yet, just as in *DePaepe,* the vehicle in this case was also "equipped with a functional restraint system that would prevent an occupant from striking those components in an accident." Ford was not offering this evidence to establish the plaintiff's negligence or her failure to mitigate damages. It was offering this evidence to show that "the overall design of the vehicle was reasonably crashworthy" – a subject the plaintiff herself chose to put at issue, and a contention that Ford has a right to defend.

2. Kansas.

The relevant Kansas statute provides that evidence of seatbelt non-use "shall not

be admissible in any action for the purpose of determining any aspect of comparative negligence or mitigation of damages." *Gardner v. Chrysler Corp.*, 89 F.3d 729, 733 (10th Cir. 1996) (*quoting* Kan. Stat. Ann. § 8-2504(c)). The court held that the statute's plain language compelled the conclusion that it did *not* preclude the use of such evidence for other purposes:

> [The plaintiff urges] a reading which essentially eliminates the clause following 'in any action,' to bar nonuse of seat belt evidence in all actions for all purposes. This interpretation misstates legislative intent and the plain meaning of the statute. . . . [I]ts language conveys the legislature's intent to bar admission of evidence of nonuse of a safety belt in any action where the purpose of its introduction is to establish comparative negligence or to mitigate damages. If introduced for another purpose, to defend allegations of a defect or to establish its presence in the vehicle, [the statute] does not apply.

89 F.3d at 735-36. The statute therefore permitted the defendant, in refuting a claim that the vehicle was not designed to be safe in a crash, to show that the plaintiff was not using her seatbelt, which was an essential component of the design to make the vehicle safe in a crash:

> Indeed, it is the *fact* that Chrysler designed an occupant restraint system that included the seat belt which we cannot foreclose Chrysler from establishing in this case. . . . [T]he trial court properly admitted evidence of plaintiff's nonuse of the seat belt and appropriately limited its use to disprove a defect.

89 F.3d at 737 (emphasis by the court). Again, the same is true here.

The Kansas Court of Appeals applied the same reasoning two years later. *See Floyd v. General Motors Corp.*, 960 P.2d 763 (Kan. App. 1998). Although *Floyd* was not a crashworthiness case, it confirmed the analysis in *Gardner*. In *Floyd*, evidence that the plaintiff was not wearing her seatbelt was properly admitted, despite the Kansas

statute, because it was not presented to show the plaintiff's negligence or failure to mitigate, but to show how the steering column became damaged in the accident. The plaintiff claimed that the steering mechanism came apart to *cause* the accident. *Id.* But the defendant's evidence was offered to show that it had come apart *because* of the accident, when the unbelted plaintiff struck it. *Id.* 960 P.2d at 765. The statute therefore did not preclude the evidence:

> The record makes clear that the defendants presented evidence of [the plaintiff's] failure to use a seat belt, not to show comparative fault, but to show that the steering mechanism did not cause the accident. The defendants sought to show that [the plaintiff] struck the steering wheel as the car rolled, deforming the steering wheel and causing the steering column to break loose. . . Thus, the defendants attempted to prove that the steering mechanism came apart as a result of the accident, contrary to the plaintiff's claim that the steering mechanism separation caused the accident.

960 P.2d at 765.

3. Louisiana.

Louisiana statute provides that failure to wear a seatbelt "shall not be considered evidence of comparative negligence," and that evidence of such failure "shall not be admitted to mitigate damages." *Rougeau v. Hyundai Motor America*, 805 So.2d 147, 150 (La. 2002) (*quoting* La.R.S. 32:295.1(E)). As a result, *because* the plaintiff had abandoned her crashworthiness claim, evidence that she was not using her seatbelt was properly excluded. 805 So.2d at 151-57. The court made clear, however, that the defendant *could* present such evidence if the plaintiff *did* pursue a crashworthiness claim. 805 So.2d at 156-58.

A crashworthiness claim, the court explained, would put at issue the safety of the vehicle's overall crash-protection design. Evidence that the plaintiff was not using a

fundamental feature of that design would be directly relevant to the reasonableness of that design. The statute did not bar the use of such evidence on that issue, and it would be fundamentally unfair to apply the statute as if it did:

> There is no express prohibition in [the Louisiana statute] against allowing an automobile manufacturer to defend against a design defect claim by showing that the design of the vehicle did not contain a defect, nor does the existence of a design defect have anything to do with the plaintiff's fault in not wearing a seat belt. Further, 'allowing a plaintiff to challenge an automobile's overall safety scheme without allowing evidence of whether the plaintiff, in fact, used such safety features is patently unfair.'

805 So.2d at 156 (*quoting* Carter, Brett R., "The Seat Belt Defense in Tennessee: The Cutting Edge," 29 Univ. of Memphis L.Rev. 215, 224-25 (Fall 1998)). Perhaps to make sure no one could possibly miss the point, the court repeated it:

> In a crashworthiness case or a case involving allegations of a defective safety restraint system, wherein a plaintiff alleges he or she sustained worse injuries in an accident that he or she would have if not for the defect, evidence that the plaintiff did not use the safety restraint systems provided by the manufacturer is highly relevant to determine whether the automobile as a whole was defectively designed.

805 So.2d at 158 n.9. Once again, the same is true here.

4. South Carolina.

In South Carolina, case law as well as statute bars evidence of seatbelt non-use to show the plaintiff's negligence or failure to mitigate damages. *Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 457-59 (4th Cir. 2001) (applying South Carolina law). Nonetheless, such evidence was "unquestionably admissible" to show the reasonableness of the vehicle's overall design in a crashworthiness case. *Id.* Neither that case law nor that statute would allow the plaintiff to attack the design of one

selected component of a vehicle's occupant-protection system in isolation, keeping the jury ignorant of the other mechanisms included in the design of that system.

The court reasoned that, by choosing to put at issue the design of the vehicle's occupant-protection system, the plaintiff must permit the jury to consider that design *as a whole*:

> In assessing crashworthiness, rather than focus on the allegedly defective part of the automobile, the jury must consider whether the vehicle was unreasonably dangerous *as a whole*. . . . Evidence of seatbelt non-use is unquestionably admissible to show the reasonableness of the vehicle's overall design.

269 F.3d at 458-59 (emphasis by the court).

As a result, the plaintiff cannot justifiably prevent the jury from learning how that design – as a whole – would function in a collision when its various mechanisms are used as intended:

> The jury must know how an individual would be affected upon impact when all of the design features, including the seatbelt, are being used as intended. The use or non-use of a seatbelt by an occupant is relevant in determining whether a vehicle is 'crashworthy' since the [allegedly-defective components] were not the only mechanisms designed to secure an occupant inside the vehicle. If [the plaintiff's] injuries could have been prevented if he had been wearing his seatbelt, then such evidence is indisputably relevant as to whether the [vehicle] is unsafe 'as a whole.'

269 F.3d at 458-59. Yet again, the same is true here.

5. Virginia.

Virginia statutes bar of evidence of seatbelt non-use to show the plaintiff's negligence or to mitigate damages. *Brown v. Ford Motor Co.*, 67 F.Supp.2d 581, 584-85 (E.D. Va. 1999). But the statute did not prevent the defendant from using such

evidence, in a crashworthiness case, "to demonstrate that its product, the [vehicle at issue], taken as a whole, was not negligently designed and that it was fit for its intended purpose." 67 F.Supp.2d at 586.

6. Indiana.

Indiana statutes and case law bar the use of seatbelt evidence to establish that the plaintiff was at fault or had failed to mitigate damages. *See Hopper v. Carey*, 716 N.E.2d 566, 574 (Ind. App. 1999). But this does not prevent the defendant from submitting such evidence to show the adequacy of an unused safety device and thereby negate the plaintiff's claim that the vehicle was not designed to be crashworthy:

> We also note that if [plaintiff] is complaining of the absence of a structure designed for the safety of passengers in the event of a roll-over, evidence that seatbelts were adequate safety devices in the absence of such a structure would be valid evidence to negate [plaintiff's] claim of causation. . . . In short, the lack of a safety device cannot be the cause of the injuries if other adequate but unused safety devices were available to the plaintiff.

716 N.E.2d at 576.

7. Mississippi.

Mississippi statute provides that failure to use a seatbelt "shall not be considered contributory or comparative negligence." *Estate of Hunter v. General Motors Corp.*, 729 So.2d 1264, 1267 (Miss. 1999) (*quoting* Miss. Code Ann. § 63-2-3). But that did not prevent the use of such evidence on other relevant issues. In this crashworthiness case, the plaintiff alleged that the vehicle was defective because the front seat backs had failed when "loaded" by the weight of the rear passengers striking them in the accident. 729 So.2d at 1269. The court held that the Mississippi statute did not bar evidence that the occupants of the vehicle were unbelted because that was relevant

and admissible to show the sequence of events inside the vehicle during the accident – facts directly related to the plaintiff's claim of defect:

> In this context, the fact that the rear passengers were (apparently) not wearing seat belts would appear to constitute relevant evidence for the jury to consider in understanding the nature of the crash.

729 So.2d at 1269.

As a result, it was appropriate for the trial court to admit the evidence of seatbelt nonuse. There was reversible error, however, because the trial court had then improperly instructed the jury – contrary to the plain language of the Mississippi statute – that this failure to wear seatbelts would establish negligence. 729 So.2d at 1269.

8. Delaware.

Delaware's statute provides that "failure to wear an occupant protection system shall not be considered as evidence of either comparative or contributory negligence" and is not "admissible as evidence in the trial of any civil action." *General Motors Corp. v. Wolhar*, 686 A.2d 170, 172 n.4 (Del. 1996) (*quoting* 21 Del.C. § 4802(i)). The statute itself did not apply to this case, since it had not gone into effect until after the accident. 686 A.2d at 172. This was of little consequence to the court's analysis, however, since Delaware common law already barred such evidence to show contributory negligence, comparative negligence, assumption of the risk, or mitigation of damages. 686 A.2d at 176 n.9.

Nonetheless, in this crashworthiness case, evidence that the plaintiff had not used her seatbelt *was* admissible to show the safety of the design of the vehicle as a whole, and to refute the plaintiff's claim of causation:

> [B]ecause the plaintiffs are alleging that Mrs. Wolhar's

> enhanced injuries were proximately caused by a design defect in her vehicle, the defendants must be permitted to introduce seat belt evidence for the limited purposes of establishing: the safety design of the vehicle as a whole; and, that non-use of the seat belt, rather than [the alleged design defect] was the supervening cause of those enhanced injuries.

686 A.2d at 176-77. Further, the court pointedly announced that this holding would be *no different under the statute*:

> Although the Seat Belt Safety Act is inapplicable to the present proceeding, both bases of this common-law holding are consistent with and will survive the enactment of that statute.

686 A.2d at 176 n.9.

9. Other states have reached the same result under their common law.

Finally, a number of courts have reached the same result when applying the common law of other states barring the use of seatbelt evidence. Those courts have consistently held that established precedents prohibiting the use of such evidence to show that the plaintiff was negligent or had failed to mitigate damages did *not* prevent the defendant from using that evidence for other purposes on different issues – most notably, to show the reasonableness of the vehicle's occupant-protection design in a crashworthiness case. *See, e.g.*, *Barron v. Ford Motor Co. of Canada Ltd.*, 965 F.2d 195 (7th Cir.), *cert. denied*, 506 U.S. 1001 (1992) (applying North Carolina law); *Whitehead v. American Motors Sales Corp.*, 801 P.2d 920 (Utah 1990); *Siren v. Behan*, 539 A.2d 1244 (N.J. App. 1988); *LaHue v. General Motors Corp.*, 716 F.Supp. 407 (W.D. Mo. 1989).

E. Due process required that Ford be permitted to tell the jury about the principal occupant-protection feature that it included in the design of this vehicle.

If West Virginia Code § 17C-15-49 is interpreted to prevent the defendant in a crashworthiness case from using any evidence related to the seatbelt the defendant included in the design of the vehicle, then the statute must be deemed unconstitutional as applied. *See* Syl. Pt. 2, *Miller v. Locke*, 162 W. Va. 946, 253 S.E.2d 540 (1979) (*per curiam*) ("A statute may be constitutional as written, yet be unconstitutionally applied in a given case."). At bottom, the question is not whether Ford should have been permitted to introduce evidence regarding the seat belt in this vehicle – that right should be readily apparent. Rather, the question is whether this statute's exclusionary language should be interpreted to avoid that improper result or must be struck down because it violates the manufacturer's right to due process in such cases.

The United States Supreme Court has recognized that "an essential component of procedural fairness is the opportunity to be heard." *Crane v. Kentucky,* 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (citations omitted). Improper exclusion of evidence that is critical to the defense can be a due process violation. *Id.* This Court has also acknowledged that the ability to present evidence is a "fundamental right" provided under the State and Federal Constitutions:

> The right to adduce evidence in a legal proceeding is a fundamental right protected by the due process clauses of both the State and Federal Constitutions. As stated in Syllabus point 2 of *Sisler v. Hawkins,* 158 W. Va. 1034, 217 S.E.2d 60 (1975): "The due process of law guaranteed by the State and Federal Constitutions, when applied to procedure in the courts of the land, requires both notice and the right to be heard."

Clay v. City of Huntington, 184 W. Va. 708, 711, 403 S.E.2d 725, 728 (1991).

Because the plaintiff's claim directly challenged the design Ford adopted to restrain the occupants of this vehicle in a crash, Ford had a fundamental due process right to put on evidence showing the relevant features that it included in that design, the warnings about occupant protection it provided to users of the vehicle, and how the features of that design, if used, will in fact protect occupants in accidents such as this one. This evidence went to the heart of plaintiff's allegations of product defect. As long as plaintiff's crashworthiness allegations are recognized by West Virginia law as a viable cause of action, Ford cannot constitutionally be precluded from putting on a defense to those allegations.

This jury could not rationally assess whether the design of the occupant-restraint system in this vehicle was reasonably prudent without considering the seat belt's pivotal role in that very design. Ford should have been permitted to show that it did not design the airbag to deploy in this circumstance (even assuming that it could have done so) because it provided a *seatbelt.* Since this evidence was not offered to put fault on the plaintiff, the jury should have been permitted to hear the truth about the safety device she refused to use, and the role that device played in the very design the plaintiff was urging them to pronounce defective.

Because the jury was not permitted to receive evidence that was directly responsive to plaintiff's defect theory under West Virginia product liability law, Ford was denied due process of law.

II. The trial court should have granted Ford's Motion for Judgment as a Matter of Law because the plaintiff's expert witness failed to apply, much less satisfy, the standard that West Virginia requires to establish that a product is "defective."

The only expert who said there was a defect in the design of this vehicle was Gary Derian. The rest of the plaintiff's evidence did nothing more than show that the plaintiff was in a collision while driving this 1999 Ford Ranger, that the airbag in the vehicle did not deploy, and that she was injured. The striking thing about the testimony from that expert is that it added nothing to those bare facts. Instead, Derian merely repeated those facts, cited them as proof the design was defective, and added his imprimatur to that opinion as an "expert."

Derian announced a breathtakingly simplistic approach to deciding whether the design of this vehicle was defective. As he saw it, the test was easy – the design would be safe if it caused the airbag to deploy when deployment *would* protect the occupant, but did not cause the airbag to deploy when deployment would *not* protect the occupant:

> [T]he issue is, if the airbag is going to protect the driver or our front occupant, then it should deploy, and if the airbag is not going to protect them or perhaps maybe even cause an injury, then it should not deploy. That's the real benchmark.[46]
>
> . . . .
>
> [T]he real criteria – and it's backed up in these SAE papers, if the airbag will protect the occupant, it should deploy and if it won't protect them, it shouldn't. . . .[47]

He then added his conclusory announcement that, because the plaintiff was injured in this accident, and because the airbag did not deploy, "she would have...benefited" if it

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[46] Vol 3, p 207 at lines 13-17.

[47] Vol 3, p 212 at line 23 to p 213 at line 1. Ford objected to Derian's description of this standard for determining product defectiveness, but the objection was overruled. Vol 3, p 213 at lines 2-11.

had deployed.[48] Thereby completing the syllogism established by his "benchmark" and "real criteria," Derian concluded that the design of this vehicle was therefore defective.[49]

Derian's test, upon which the plaintiff built her case, is wildly off the mark. It completely sidesteps what West Virginia law requires a plaintiff to prove in order to establish that a product is "defective." Neither Derian's testimony nor any other evidence the plaintiff submitted met those requirements. Accordingly, Ford's Motion for Judgment as a Matter of Law should have been granted.[50] This is a question of law reviewed *de novo*. *See* Syl. Pt. 1, *Crystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 139, 459 S.E.2d 415, 416 (1995)

Under the law of this State, a product is "defective" if it is not reasonably safe for its intended use:

> In this jurisdiction the general test for establishing strict liability in tort is whether the involved product is defective in the sense that it is not reasonably safe for its intended use.

Syl. Pt. 4, *Morningstar v. Black and Decker Manufacturing Co.*, 162 W.Va. 857, 253 S.E.2d 666 (1979). Deciding whether the design of a product made it "not reasonably safe" for its intended use is determined by whether a reasonably prudent manufacturer would have designed it that way:

> The term 'unsafe' imparts a standard that the product is to be tested by what the reasonably prudent manufacturer would accomplish in regard to the safety of the product, having in mind the general state of the art of the manufacturing process, including design, labels and warnings, as it relates to economic costs, at the time the product was made.

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[48] Vol 3, p 208 at lines 19-22.
[49] *See, e.g.*, Vol 3, p 215 at lines 13-30.
[50] ROA pp 100-23 (Ford's motion and memorandum in support); ROA pp 132-42 (trial court's Order denying that motion).

Id., at Syl. Pt. 5. Furthermore, that assessment involves a "risk/utility analysis" to determine whether the risks of the allegedly-defective design outweighed its benefits:

> We believe that a risk/utility analysis does have a place in a tort product liability case by setting the general contours of relevant expert testimony concerning the defectiveness of the product.

Id. 162 W.Va. at 887, 253 S.E.2d at 682

A plaintiff's expert witness is expected to provide evidence useful to the jury on all of these factors:

> In product liability case, the expert witness is ordinarily the critical witness. He serves to set the applicable manufacturing, design, labeling and warning standards based on his experience and expertise in a given product field.
>
> Through his testimony the jury is able to evaluate the complex technical problems relating to product failure, safety devices, design alternatives, the adequacy of warnings and labels, as they relate to economic costs. In effect, the expert explains to the jury the risk/utility standards and gives the jury reasons why the product does or does not meet such standards, which are essentially standards of product safeness.

Id.

Derian's testimony did nothing to assist the jury on any of these factors. He did not present any evidence that Ford's design of this 1999 Ranger deviated from industry or government standards or practice, did not present any evidence to show how other manufacturers determine airbag deployment thresholds on their restraint systems, did not compare any such system to that of the 1999 Ranger, and did not present any evidence that the risks posed by this occupant-restraint system outweighed the benefits of its design.

Indeed, Derian's ignorance on the subjects that should have been the focus of

his testimony was remarkable. When pressed to discuss some of the engineering data that any manufacturer would have to consider in designing a safe airbag system Derian brushed the subject aside as if it were a nettlesome distraction and reverted to his simplistic "benchmark:"

> You know, I know Ms. Estep had somewhat of a pole crash, and the airbag didn't go off, and she got hurt, ... I don't know all this other stuff that you asked me.[51]

He admitted that he did not know the types of tests Ford performed on airbag systems, although he suspects that Ford did a lot of them.[52] He did not know where automobile manufacturers set their impact-speed thresholds for airbag deployment, and he was unable to say what that threshold ought to be – either for vehicles in general or for this 1999 Ranger in particular.[53] On all such subjects, Derian simply incanted his "benchmark" that the airbag should be designed to deploy when it would protect the occupant and to not deploy when it would not.[54]

The plaintiff's expert offered nothing to balance the risks against the benefits of this or any other vehicle design. Notably, he avoided the most fundamental trade-off required in the design of any airbag system – the fact that a rapidly-inflating airbag can *itself* be a hazard. This is an unavoidably well-established reality.[55] Designing such a system thus requires striking a thoughtful balance to establish the appropriate deployment threshold *in advance of any possible accident*. Although lowering the impact-force at which the airbag will deploy might add to the occupant's protection in some potential accidents, it will increase the risk that the occupant might be injured by

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[51] Vol 3, p 215 at lines 13-30.
[52] Vol 3, p 202.
[53] Vol 3, pp 206-15.
[54] *See, e.g.,* Vol 3, p 207 at lines 12-17; p 208 at lines 19-22; p 212 at line 21 to p 213 at line 1.
[55] *See, e.g.,* Vol 6, pp 64,141, 160; 62 Fed Reg. 62406-07, 62409; 65 Fed. Reg. 30681, 30683.

the deploying airbag itself in accidents where the airbag is not truly needed. At some point, as the accident speed drops, the marginal added protection that the airbag could provide does not outweigh the added risk presented by the deploying airbag itself.

Derian could not claim to be ignorant of this inherent trade-off. Indeed, he admitted having testified in another case that the vehicle was defective because the airbag *did* deploy.[56] Nonetheless, he gave no indication of how Ford should have resolved that trade-off any differently in the design of this 1999 Ranger – other than to announce that the design should have the airbag deploy when it will protect the occupant and not deploy when it will not. That does nothing to answer the fundamental design question at the heart of this case; it merely restates that question.

The evidence plaintiff presented at this trial can support this judgment only by imposing on Ford a standard of absolute liability. That is not the law. Ford is not an insurer of its products, and West Virginia does not impose absolute liability. *See Morningstar v. Black and Decker Manufacturing Co.*, 162 W. Va. at 878, 253 S.E.2d at 677 ("[T]he term [strict liability in tort] does not impose absolute liability or make the manufacturer an insurer of his product."); *Star Furniture Co. v. Pulaski Furniture Co.*, 171 W.Va. 79, 82, 297 S.E.2d 854, 856 (1982) (same). Even Derian admits that it is not possible to design an injury-proof vehicle, that every model vehicle has accidents, and that many people get seriously hurt in accidents apart from any defect in the vehicle.[57]

But a standard of absolute liability, making Ford an insurer, is precisely what the plaintiff was permitted to impose in this case. Her expert witness premised his defect claim on the simplistic connection of two bald facts – the airbag did not deploy in this

[56] Vol 3, pp 242-45.
[57] Vol 3, p 198-199.

accident and the occupant was injured. This is not the standard for establishing a claim of product defect under West Virginia law, and it should not become the standard.

III. The plaintiff presented no evidence to show that an alleged defect in this vehicle caused her spinal injury, since her theory of causation was based on a factual assumption that was conclusively proven false.

This point should not require belabored discussion. The simple dispositive facts are these: (1) The only evidence the plaintiff offered to connect the defect she alleged in this vehicle (the non-deployment of the airbag) to the injury she sustained (a wedge compression fracture of her L2 vertebrae) was the testimony of her biomechanical expert witness, Mari Truman.[58] (2) To connect those two points, Truman posited a causation theory – that the plaintiff's upper body "whipped" over the steering wheel and thereby injured her back while bending the steering column – that rested on a single factual assumption (that the steering column in this vehicle was bent in course of the accident).[59] (3) Truman adopted that assumption from another witness, Gary Derian, without any independent examination or verification of her own.[60] (4) That assumption was conclusively proven false.[61] So (5), the theory constructed on that assumption must collapse, and without it the plaintiff has no evidence of causation at all.

This is not a matter of weighing conflicting evidence or assessing the credibility of the witnesses. There was no conflicting evidence on this point whatsoever. The assumption was simply false; the steering column was *not* bent. The measurements of the steering column from which Derian had leaped to that conclusion were exactly what they were supposed to be – what they were designed to be, what they were before the

[58] Vol 4, pp 52-219.
[59] Vol 4, pp 125-30, 172-76, 202.
[60] Vol 4, pp 169-170.
[61] Vol 6, pp 197-202; DX 375; DX 376; DX 378; DX 379.

accident, and what they were in an undamaged 1999 Ranger.[62] Derian had simply never bothered to check. His underlying assumption, the foundation for the plaintiff's entire theory of causation, was thus proven to be categorically and unqualifiedly wrong. The theory of causation built upon that assumption must collapse as a matter of law.

Even Truman, the plaintiff's expert, admitted that this assumption was "central" to her opinion.[63] She also acknowledged that, if the steering column was not bent, she could not be sure the plaintiff had collided with the steering wheel at all:

> Well, let's just say that had the steering wheel not shown any damage, then that would have been -- then you would have wondered did she really get restrained by it. Okay?[64]

Indeed, she testified that she would have to re-evaluate her causation theory from its starting point:

> Q. Would it make a difference to you if that steering wheel...is the same as it was manufactured, that it really wasn't out of alignment?
>
> A. Well, at this point, then we'd have to go back and re-valuate from the standpoint of we know that there's still a big Delta-V in there but that – that was -- that is more indicative of her position, and then we have to take that out of the position because now it becomes ambiguous.[65]

A plaintiff cannot sustain a product liability claim without evidence to show a causal link between an alleged defect in that product and the plaintiff's injury. *See Morningstar v. Black and Decker Manufacturing Co.*, 162 W.Va. 857, 253 S.E.2d 666 (1979). There was no such evidence here. As a result, the trial court should have granted Ford's motion for judgment as a matter of law.

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[62] Vol 6, pp 197-202; DX 375; DX 376; DX 378; DX 379.
[63] Vol 4, p 205 at lines 3-7.
[64] Vol 4, p 169 at lines 18-21.
[65] Vol 4, p 206 at lines 12-19.

IV. The trial court erred in refusing to instruct the jury that compliance with the relevant Federal Motor Vehicle Safety Standards raises a rebuttable presumption that this vehicle was reasonably safe and not defective.

The jury should have been instructed that compliance with Federal Motor Vehicle Safety Standards governing crash protection created a presumption that the occupant-restraint system in this vehicle was not defective. By law, those standards must "meet the need for motor vehicle safety," 49 U.S.C. § 30111(a), and must "protect[] against unreasonable risk of death or injury." 49 U.S.C. § 30102(8). Each of these standards, including those relevant here, is the product of a diligent effort by the United States Department of Transportation to fulfill that statutory mandate.

The United States Supreme Court has recognized that the safety standards thereby adopted represent the informed judgment of the Department of Transportation and should be given weight:

> Congress has delegated to DOT authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements.... In these circumstances, the agency's own views should make a difference.

Geier v. American Honda Motor Company, Inc., 529 U.S. 861, 883, 120 S.Ct. 1913, 1926, 146 L.Ed.2d 914 (2000).

This Court has previously held that a jury may consider the federal safety standards, but that compliance with those standards is not conclusive proof that the design of the product was reasonable. *See, Johnson v. General Motors Corp.,* 190 W. Va. 236, 247, 438 S.E.2d 28, 39 (1993). Although compliance with such standards may

not be a conclusive defense, it should be given significance beyond mere passing acknowledgment.

The law of West Virginia makes clear that a product is not defective unless it is shown to depart from the industry standard for reasonable safety:

> The standard of reasonable safeness is determined not by the particular manufacturer but by what a reasonably product manufacturer's standards should have been at the time the product was made.

Syl. Pt. 4, *Morningstar v. Black and Decker Manufacturing Co.*, 162 W.Va. 857, 253 S.E.2d 666 (1979). *See also id.* at Syl. Pt. 5 ("The term 'unsafe' imparts a standard that the product is to be tested by what the reasonably prudent manufacturer would accomplish in regard to the safety of the product. . . . ")

The nationwide motor vehicle safety standards adopted by the Department of Transportation set those standards for the entire industry; they establish what a "reasonably prudent manufacturer would accomplish." At the very least, compliance with those standards should, as the Model Instruction provides, raise a rebuttable presumption that the product is safe with respect to matters directly addressed by those standards. Here, the evidence was undisputed that the 1999 Ranger met – indeed, it exceeded – all of the federal motor vehicle safety standards related to occupant crash protection and airbag performance.[66] Nonetheless, the trial court refused to give the Model Instruction.[67]

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[66] Vol 6, pp 162-67. What is more, Ford conducts many additional tests of it vehicles' occupant-protection designs in excess of those required by any governmental agency: numerous barrier tests at varying speeds, developmental sensor tests, overlap crash tests (on both driver and passenger sides), bumper override tests, more than one hundred sled tests, dummy tests (representing small, medium and large persons), rough road tests, durability tests, washboard tests, snowplow tests, curb impact tests, railroad crossing tests, airbag non-deploy tests, airbag must-deploy tests, electromagnetic and radio frequency interference tests, as well as numerous other tests. Vol 6, pp 179-86

[67] ROA p 93; Vol. 7, pp 12-17.

That Model Instruction would not have told the jury that compliance with federal safety standards conclusively established Ford's defense. It would merely have given the jury proper guidance with which to assess the import of that compliance in light of the fact that those standards are the product of the Department of Transportation's informed judgment, the standards themselves are required to "meet the need for motor vehicle safety" and to "protect[] against unreasonable risk of death or injury," and that a product design that meets those standards should therefore be presumed reasonable and safe.

Other courts have noted that "[c]ompliance with government regulations is strong evidence, although not conclusive, that a machine was not defectively designed." *Sims v. Washex Machinery Corp.*, 932 S.W.2d 559, 565 (Tex. App. 1996) (internal citations omitted); *see also, Jones v. Hittle Service, Inc.*, 219 Kan. 627, 549 P.2d 1383, 1390 (1976) ("Compliance [with a legislatively or administratively enacted standard] is evidence of due care and that the conforming product is not defective, and may be conclusive in the absence of a showing of special circumstances."). The Model Instruction also tracks with the approach of a neighboring state, which establishes the presumptive effect of government standards by statute. *See, Murphy v. Montgomery Elevator Co.*, 957 S.W.2d 297 (Ky.App. 1997) (applying KRS 411.310(2), which creates a rebuttable presumption that a product was not defective if its design and manufacture conformed to the state of the art at the time of design and manufacture).

Furthermore, the Model Instruction is consistent with the approach to this issue in the new Restatement of Products Liability:

> In connection with liability for defective design or inadequate instructions or warnings: . . . (b) a product's compliance with

> an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, § 4 (1998). The official comment to this section explains that it may be appropriate to recognize compliance which such standards as absolutely precluding any contrary allegation that the product is defective:

> Occasionally, after reviewing relevant circumstances, a court may properly conclude that a particular product safety standard set by statute or regulation adequately serves the objectives of tort law and therefore that the product that complies with the standard is not defective as a matter of law. Such a conclusion may be appropriate when the safety statute or regulation was promulgated recently, thus supplying currency to the standard therein established; when the specific standard addresses the very issue of product design or warning presented in the case before the court; and when the court is confident that the deliberative process by which the safety standard was established was full, fair, and thorough and reflected substantial expertise....

Id. at Comment e.

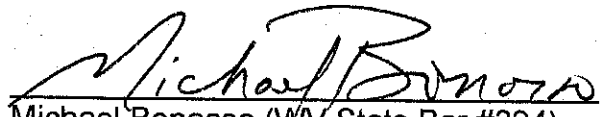
It follows that compliance with such safety standards should, *at the very least,* give rise to a rebuttable presumption that the product is not defective. That is the approach incorporated into the Model Instruction, and that instruction should have been given. The jury should have been told that Ford was entitled to a rebuttable presumption that the occupant-restraint system in this vehicle was safe.

PRAYER

For the foregoing reasons, appellants Ford Motor Company and Mike Ferrell Ford Lincoln-Mercury, Inc., ask the Court to reverse the judgment entered below and to then render judgment in favor of the appellants as a matter of law or, in the alternative, remand this case for a new trial.

Respectfully submitted,

FORD MOTOR COMPANY and MIKE FERRELL FORD LINCOLN-MERCURY , INC.
By Counsel



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CERTIFICATE OF SERVICE

I, Michael Bonasso, counsel for defendants/appellants Ford Motor Company and Mike Ferrell Ford Lincoln-Mercury, Inc., hereby certify that I have this 23rd day of May, 2008 served the foregoing **Brief of Appellants Ford Motor Company and Mike Ferrell Lincoln-Mercury, Inc**. upon counsel of record for plaintiff/appellee as follows:

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